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In the

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION,
Petitioner,

v.

SIERRA CLUB,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE OHIO FORESTRY ASSOCIATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether respondents' challenge to the Wayne National Forest Land and Resource Management Plan developed by the United States Forest Service in accordance with the National Forest Management Act of 1976 presents a justiciable controversy.

2. Whether the Forest Service is, by virtue of the statutes under which it operates, institutionally biased in favor of timber production in a judicially remediable way.

3. Whether the statutes providing for multiple use of the national forests grant a preference to primitive recreation or restrict even-aged management to "exceptional circumstances."

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. Over 25,000 individuals, organizations, and associations support PLF's efforts nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the authority of administrative agencies to exercise the discretion delegated to them under Acts of Congress. For example, PLF participated as amicus curiae before the United States Supreme Court in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Amicus seeks to augment the argument in the petitioner's brief by elucidating the purposes for which our National Forests were created and the aims and goals of federal legislation governing National Forest lands and United States Forest Service policy. PLF believes that its public policy perspective and litigation experience dealing with federal land regulation will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court Rule 37, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Under the National Forest Management Act, 16 U.S.C. § 1600, *et seq.*, the United States Forest Service is obligated to create a Land and Resource Management Plan (Plan) periodically for each National Forest. 16 U.S.C. § 1604. A Land and Resource Management Plan does not dictate the activities that will occur on a particular forest; however, it does serve as a blueprint for the activities which are permissible on a given forest for periods of up to 15 years. 16 U.S.C. § 1604(f)(5).

In 1988, the Regional Forester for the Eastern Division of the United States Forest Service issued, after seven years of planning, a final 10-year Plan for the Wayne National Forest in Ohio. *Sierra Club v. Thomas*, 105 F.3d 248, 249 (6th Cir. 1997); *Sierra Club v. Robertson*, 845 F. Supp. 485, 489 (S.D. Ohio 1994), *rev'd Sierra Club v. Thomas*, 105 F.3d 248. Under the Wayne Plan, the Forest Service designated 126,107 acres, or roughly 71% of the 177,701 acres of federal land within the gross area of the forest, as suitable for timber harvesting. *Thomas*, 105 F.3d at 249, *Robertson*, 845 F. Supp. at 489. The Plan allows up to 7.5 million board feet of timber to be harvested per year. *Thomas*, 105 F.3d at 249. The Plan also specifies that 80% of the harvesting may be done by means of "even-aged" management or clearcutting. *Robertson*, 845 F. Supp. at 490. The remaining 20% may be harvested under "uneven-aged" management methods. *Id.*

The Sierra Club challenged the Wayne Plan, alleging the Forest Service had violated both the National Forest Management Act, the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq.* and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* *Robertson*, 845 F. Supp. at 487.

The District Court rejected each of the Sierra Club's challenges, finding that the record adequately supported the findings and decisions of the United States Forest Service in adopting the Plan. *Id.* at 503. On appeal, the Sixth Circuit reversed. *Thomas*, 105 F.3d at 249. The Sixth Circuit determined: (1) the Sierra Club had standing to bring this challenge; (2) the Forest Service's decision to allow significant timber harvesting under the Wayne Plan amounted to an unlawful institutional "bias" in favor of timber harvesting; and (3) the Forest Service abused its discretion, because the National Forest Management Act allows even-aged management only under "exceptional circumstances."

The validity of the Sixth Circuit's opinion on each of these questions was presented to this Court for review. Believing the first issue will be adequately addressed by the parties to this case, amicus Pacific Legal Foundation will address only the latter two.

SUMMARY OF ARGUMENT

The opinion of the Sixth Circuit demonstrates a marked ignorance of and disregard for the congressional policies behind creating, funding, and maintaining our National Forest System. Our national forests were not created to preserve trees. Rather, they were created for multiple productive uses, including the growth and harvesting of timber.

The history behind federal enactments dealing with the National Forest System and the United States Forest Service as well as the federal enactments themselves demonstrate a distinct and prominent interest in promoting the use of national forests for the provision of raw timber to benefit United States citizens. Consequently, any "bias" of the Forest Service in favor of timber production is entirely reflective of Congress' express intent in managing the National Forest System.

The National Forest Management Act was enacted specifically to restore the practice of clearcutting as one of the tools available to the Forest Service for managing National Forest lands. The Sixth Circuit's reading that the National Forest Management Act was intended to prohibit or severely limit its uses to "exceptional circumstances" turns this legislation on its head.

The Forest Service's mandate is to manage the National Forests for multiple uses. Our national forests provide us with places to hunt, ski, hike, mountain climb, camp, fish, and carry out many other recreational activities. But Congress also intended our forests to serve another purpose: sustained yield--to provide citizens with resources needed to build affordable homes and furnishings, and to produce paper and other wood products. The court below unjustifiably enforced its own preference for wilderness and recreation over the greater and more varied interests of the American people as expressed through their representative government. For these reasons, this Court should reverse the decision of the court below.

ARGUMENT

I

THE FOREST SERVICE'S PROMOTION OF TIMBER HARVESTING ON NATIONAL FOREST LAND IS NECESSARY TO MEET ITS STATUTORY OBLIGATIONS

> The forests must be, and will be, not only preserved but used, and the experience of all civilized countries that have faced and solved the question shows that the forests, like perennial fountains, may be made to yield a sure harvest of timber while at the same time all their far-reaching beneficent uses may be maintained unimpaired.
>
> *John Muir, founder of the Sierra Club, in 1895.*

Historically, it has been acknowledged that a forest can serve many competing needs. The serenity and beauty of a forest can provide respite from the frantic pace and stress so common in modern urban life. But a forest can also play a part in creating the facilities for modern urban living: wood for housing and other buildings, furnishings, and paper products. In setting up the National Forest System, Congress favored an approach founded upon the idea suggested by John Muir. Congress designated some of this Nation's forests as National Forests to provide a sustained yield of timber, but directed that they be managed so that Americans could enjoy the many other benefits forests provide. This case deals with whether the United States Forests Service met its management obligations in creating a Plan for the management of the Wayne National Forest.

The Sixth Circuit concluded that the Wayne Plan was arbitrary and capricious, and therefore contrary to law, because the Forest Service has an institutional bias in favor of timber harvesting. The court summarized the Forest Service's handicaps thus:

> Created, in part, to ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses. Rather than being a neutral process which determines how the national forests can best meet the needs of the American people, forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse.

Thomas, 105 F.3d at 251. The court further explained that legislatively created financial incentives related to timber harvests skewed the Forest Service's decisions, demonstrating an unlawful "bias" in favor of timber harvesting over other forest uses. *Id.*

The problems with the Sixth Circuit's conclusions are almost too fundamental to adequately critique. Under the lower court's simplistic rule, the mere continued existence of the Forest Service under current law creates a bias that may be invoked to invalidate every Plan for every forest in the United States (or, for that matter, any other Forest Service rule, regulation, or enactment). Indeed, in the Sixth Circuit's view, the only possible "unbiased" plan may be one that allows no timber harvesting at all. The court's summary conclusion that this "bias" renders the Forest Service incapable of determining how to "best meet the needs of the American people" begs the question: who, then, is capable of making (and has the authority to make) this neutral determination? Apparently, in the Sixth Circuit, the answer is the Sixth Circuit Court of Appeals itself.

The Forest Service, like any organization, and certainly like every bureaucracy, is not immune from error. However, the error assigned to it by the Sixth Circuit, that the Forest Service has an unlawful "bias" in favor of timber harvesting, is absurd for the simple reason that the promotion of timber harvesting on national forest land is part of its congressional mandate. The "bias," if any exists, must be assigned to Congress, and any disagreement with Congress on what is in the best interests of the American people should be debated in the House of Representatives and Senate, not the courtroom.

A. Under the Organic Administration Act of 1897, the National Forests Were Created for the Express Purpose of Providing a Supply of Natural Resources for the Use of the American People

To put this case in context, it is useful to understand the history of our national forests--what interests prompted their creation, and what interests prevailed in the Congressional Acts that govern their management. The view adopted by the court below, and embraced by late Twentieth Century environmental activists--that the best use of our National Forests is to preserve

trees for the sake of the trees themselves--is a view which, rightly or wrongly, has never commanded a majority of our legislature.

As elaborated upon by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), the National Forest System had its genesis with the Act of March 3, 1891 (the Creative Act). James L. Huffman, *A History of Forest Policy in the United States*, 8 Env. L. 239, 258 (1977). Section 24 of that Act (sometimes referred to as the Forest Reserve Act) delegated to the President of the United States the power to reserve portions of the public land bearing forests. *Id.* at 258-59 (citation omitted). Under this Act, the President could simply create a forest reserve by proclamation and establish the limits of that reservation. *Id.*

Pursuant to this Act, President Harrison established 15 reserves covering 13 million acres before he left office in 1893. *Id.* at 360 (citation omitted). Soon thereafter, succeeding President Grover Cleveland established two additional reserves, adding another 4.5 million acres to our national forest reserves. *Id.* (citation omitted). However, these actions were not taken without controversy. As pointed out by Gifford Pinchot, one of the leading foresters and conservationists of the era (and one of the early chief foresters of the Forestry Division within the Department of the Interior), *id.* at 251-53, one of the problems created by the Forest Reserve Act is that it did not provide for use or management of these forest reserves--only their creation. *Id.* at 259-60 (citation omitted).

This problem noted by Pinchot--the tension between preservation interests versus those who prefer to use forest preserves--came to a head in 1897. Ten days before leaving office, Grover Cleveland designated an additional 21 million acres of federal land as forest reserves. *Id.* at 262 (citation omitted). This alarmed members of Congress, who believed these lands would thus be "locked up" rather than used. *Id.* (citation omitted). The irony was that Cleveland had no such

intention. His administration had created the National Forest Commission (Commission), whose assigned role was to create a plan for forest management and use. *Id.* at 261 (citation omitted). However, the Commission had not completed its plan by the time Cleveland left office. *Id.* at 263 (citation omitted). Shortly after McKinley took office, the Commission issued a report. The report concluded:

> These great bodies of reserved lands cannot be withdrawn from all occupation and use. They must be made to perform their part in the economy of the Nation. Unless the reserved lands of the public domain are made to contribute to the welfare and prosperity of the country, they should be thrown open to settlement and the whole system of reserved forest abandoned.

Id. at 263 (citation omitted).

Despite the Commission's full support of the use of forest reserves, Congress felt compelled to act on its own in order to forestall the possibility that future Presidents would disfavor the use of public forests. Senator Pettigrew of South Dakota introduced a bill for the management of the public forest reserves. *Id.* (citation omitted). The Pettigrew Amendment to the Appropriations bill was passed on June 4, 1897. *Id.* at 264 (citation omitted). The language of the Pettigrew Amendment, with minor modifications, is still codified at 16 U.S.C. § 475 as the Organic Administration Act:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . .

16 U.S.C. § 475. Thus was the National Forest System created for the use and management of timber resources.

B. The United States Forest Service's Focus upon Timber Production Is in Accordance with Legislative Purposes

For the first half of this century, the Organic Administration Act governed the management of the National Forests, and that Act remains viable today. One of the more telling events in the history of our national forests was that the job of managing our national forests was transferred from the Department of the Interior to the Department of Agriculture. The effort to move the management of national forests from Interior over to Agriculture culminated in 1905 with the Act of February 1, 1905. Huffman, 8 Env. L. at 267 (citation omitted). At that time, Overton Price of the Forestry Division explained the logic of the move:

> Forestry is a component post of agriculture. Every source of wealth grown from the soil is in the sphere of the Department of Agriculture; hence the forest work rightly belongs to it. The production of timber is as naturally within the scope of the Department of Agriculture as is the production of field crops.

Id. at 266-67 (citation omitted). By June of 1905, the United States government had designated over 85 million acres as forest reserve lands. *Id.* at 268 (citation omitted). By the time President Theodore Roosevelt left office in 1909, there were over 159 national forests totaling over 150 million acres. *Id.* at 269-70 (citation omitted).

Although there was much debate and controversy surrounding the Forest Service's management of the National Forests throughout the early part of this century, no legislation was enacted which altered either the Forest Service's authority over the national forests, or the basic mandate of the Organic Administration Act. Throughout this period, this Court faithfully adhered to the principle that the Court had no power

to usurp or undermine congressional authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. In deciding *Light v. United States*, 220 U.S. 523 (1911), this Court held:

> The United States can prohibit absolutely or fix the terms on which its property may be used.
>
> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160. [] And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, *nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.*

Light, 220 U.S. at 536-37 (emphasis added). Despite the dissatisfaction of those who would have preferred preservation to use of forest resources, Congress did not feel compelled to change the law with regard to either the purposes of National Forest System lands or the jurisdiction of the Forest Service. And courts appropriately refused to engage in value judgments about Congress' wisdom in managing National Forests for timber production.

C. The Multiple Use Sustained Yield Act of 1960 Expanded the Purposes for Which the National Forests Were to be Managed, but Did Not Undermine or Displace the Purposes Established by the Organic Administration Act of 1897

Although there was much debate within political and public circles that national forests were being managed in too

utilitarian a manner, it was not until 1960 that Congress reassessed its determination of what best served the interests of the American people in the management of our National Forests. That year, Congress passed the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq*. The Multiple-Use Sustained-Yield Act proclaimed:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

16 U.S.C. § 528. While Congress expanded the uses for which the forests should be managed, it emphasized that the purposes behind creating our National Forest System--protection of watershed and production of timber--remained paramount. To the statement above, it added the qualification:

> The purposes [of this Act] are declared to be *supplemental to, but not in derogation of*, the purposes for which the national forests were established . . . .

16 U.S.C. § 528 (emphasis added).

Though still valid, the Multiple-Use Sustained-Yield Act has not been a particularly satisfactory piece of legislation for those who favor forest preservation over use, largely because the Multiple-Use Sustained-Yield Act does not impose any substantive requirements upon the Forest Service. *See Sierra Club v. Morton*, 405 U.S. 727, 728 n.7 (1972) (Douglas, J. dissenting). The Multiple-Use Sustained-Yield Act requires that the Secretary of Agriculture give "due consideration" to the "relative values" of the various multiple uses in the administration of the National Forests. 16 U.S.C. § 529. As pointed out in *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971), *rev'd sub nom., Sierra Club v. Butz*, 542 F.2d 1180 (9th Cir. 1976), although the Forest Service was obligated to consider multiple uses under the Multiple-Use Sustained-

Yield Act, Congress had not indicated the "weight to be assigned each value." *Id.* at 123. Consequently that court declined to disturb the Forest Service's judgment in the administration of forest policy.

Despite any perceived shortcomings, however, the Multiple-Use Sustained-Yield Act and the Organic Administration Act remain the law regarding the purposes for which our National Forests exist. While the National Forest Management Act, the National Environmental Policy Act, and other legislation have imposed procedural requirements upon the Forest Service, Congress has never disturbed the basic precept that the primary management purposes for our National Forests are the production of timber and the protection of watershed resources. Indeed, this Court pointed out that, even under the Multiple-Use Sustained-Yield Act, *a national forest could not be established unless* it served one of these purposes, because the multiple-use purposes were secondary to the purposes enunciated in the Organic Administration Act. *New Mexico*, 438 U.S. at 715.

It is important to note, however, that the primacy of resource use in the management of our National Forests has not been at the expense of conservation. On the contrary, Congress has attended assiduously to the interests of conservationists in preserving places of natural beauty, value, interest, and importance. For example, in 1916, Congress passed the National Park System Act, 16 U.S.C. § 1, *et seq.*, and in 1964 Congress passed the Wilderness Act. 16 U.S.C. § 1131, *et seq.* In addition, Congress has created numerous National Recreation Areas and National Conservation areas by federal enactment, *see, e.g.*, 16 U.S.C. § 90a, 16 U.S.C. § 460y, and Presidents since 1906 have used the Antiquities Act, 16 U.S.C. § 431, *et seq.*, to create national monuments. President Carter used the Antiquities Act to designate 56 million acres of land in Alaska for 17 national monuments. George Cameron Coggins and Robert L. Glicksman, *Public Natural Resources*

Law, Vol. I, § 2.03[2][a]at 2-11 (Clark Boardman Callaghan 1997), and just last year, President Clinton used the Antiquities Act to designate 1.6 million acres of land in Utah as the Grand Staircase-Escalante National Monument. 61 Fed. Reg. 50,223. As of 1994, the National Park System had set aside over 80 million acres of federal land spread over 49 states. *United States Department of Interior National Park Service Master Deed Listing as of December 31, 1994*. In addition, although National Forest Lands cover 191 million acres of federal land, Coggins and Glicksman, § 2.03[2][b] at 2-14, over 44 million acres of National Forest land have been set aside for wilderness areas, wild and scenic river areas, game refuges and other preserves. *Land Areas of the National Forest System as of September 30, 1994*, USFS FS-383. In addition, 91 million acres under the control of the United States Fish and Wildlife Service have been set aside for fish and wildlife protection, *Annual Report of Lands Under Control of the USFWS as of September 30, 1994*, and the Bureau of Land Management presides over even more federal land set aside as wilderness, outstanding natural areas, national natural landmarks, and other areas of environmental value. *See generally*, 43 U.S.C. § 1782, Coggins and Glicksman, § 2.04[2] at 2-20-1.

The perception urged upon American citizens by environmental activists and accepted without question by the court below is that the public forest lands of the United States are being denuded in favor of timber industry interests. Ignoring for the moment that the timber industry serves the desires and demands of large portions of the American populace, this perception about public lands is plainly wrong and distorted. Besides the fact that tremendous portions of federal land, including large portions of forested lands, have been set aside for the purpose of preservation, timber growth is more than keeping pace with timber consumption. In 1991, annual timber growth outstripped timber harvest on United States timberland by over 5 billion board feet. Douglas S. Powell, Joanna L. Faulkner, David R. Darr, Zhiliang Zhu,

Douglas MacCleery, *Forest Resources of the United States, 1992*, USDA Forest Service General Technical Report RM-234. In fact, the amount of timber harvested in this country has consistently been lower than the amount grown since the 1950's. *USDA, Forest Service: An Analysis of the Timber Situation in the United States, 1952-2030; Forest Resources of the United States* (1992).

The United States Congress created a system of public lands that categorizes land by purpose and jurisdiction. To preservationists like the respondents in this case, it is not enough that Congress has set aside national wilderness areas, national parks, wild and scenic rivers, national monuments and other federal land reserves. Now it appears that the competing interests of Americans in using natural resources to improve the quality of their lives must also give way to preservationist goals. This is not and never has been the means by which Congress chose to meet the needs of the American people. The Forest Service manages our National Forests with the goal of promoting the purposes for which Congress created them: timber production and watershed protection. This Court should affirm that timber production is not merely an allowable goal of the Forest Service in managing forest lands, but one of the central and governing principles by which it is obligated to operate.

II

THE FOREST SERVICE'S DECISION TO ALLOW CLEARCUTTING IS CONSISTENT WITH THE TERMS OF THE NATIONAL FOREST MANAGEMENT ACT AND ITS IMPLEMENTING REGULATIONS

A. The History Behind the National Forest Management Act Demonstrates That Congress Accepted the Use of Even-Aged Management as a Forest Management Tool

The Sixth Circuit rejected the Wayne Plan largely because the Forest Service projected that even-aged management

techniques, or clearcutting would be utilized on 80% of the land designated for timber harvest. As correctly noted by the Court, the National Forest Management Act allows even-aged management only when "*consistent with* the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v) (emphasis added). Based on this language, the Court drew the astounding conclusion, "The National Forest Management Act *thus contemplates that even-aged management techniques will be used only in exceptional circumstances*." *Thomas*, 105 F.3d at 251 (emphasis added). In short, the Sixth Circuit made an unsubstantiated presumption that even-aged management is rarely consistent with preserving environmental values and timber resources. It transformed an essentially fact-based determination--whether the Forest Service's decision satisfied the terms outlined in the National Forest Management Act--into a value judgment--what set of facts would satisfy a court's conception of "exceptional circumstances."

Part of the Sixth Circuit's error derived from its misconception of the purposes behind the National Forest Management Act. The Court noted:

> The National Forest Management Act was enacted as a direct result of congressional concern for Forest Service clearcutting practices and the dominant role timber production has historically played in Forest Service policies. Congress was concerned that, if left to its own essentially unbridled devices, the Forest Service would manage the national forests as mere monocultural "tree farms." . . . Substantively, the Act imposes extensive limitations on timber harvesting by restricting the use of clearcutting to situations where clearcutting is the optimum method for harvesting.

Thomas, 105 F.3d at 258-59. The court's analysis is flawed. Although the enactment of the National Forest Management

Act was indeed prompted by Congress' concerns about clearcutting, *the concern was that clearcutting had been improperly banned through court order*.

The immediate impetus behind the National Forest Management Act was a case called *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*, 367 F. Supp. 422 (N.D. W. Va. 1973), *aff'd*, 522 F.2d 945 (4th Cir. 1975) (the *Monongahela* decision). John F. Hall and Richard S. Wasserstrom, *The National Forest Management Act of 1976. Out of the Courts and Back to the Forests*, 8 Env. L. 523, 523 (1977). In *Monongahela*, an environmental group sued the Secretary of Agriculture, challenging the validity of certain timber sale contracts for timber within the Monongahela National Forest. *Monongahela*, 367 F. Supp. at 424. Specifically, the plaintiffs (one of whom was the Sierra Club, plaintiff here) alleged that the contracts violated the terms of the Organic Administration Act. *Id.* Section 476 of that Act stated:

> For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture . . . may cause to be designated . . . so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon and may sell the same.

Monongahela, 367 F. Supp. at 424 n.1. It also provided:

> Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of Agriculture . . . .

Id. The timber sale contracts in question, not unlike many of the contracts entered into by the Forest Service, allowed timber harvesters to clearcut entire stands, regardless of whether all of the trees within a particular stand were "dead, matured, or

large." *Id.* at 427. The Forest Service also "marked and designated" trees by sectioning off entire areas, rather than marking each individual tree. *Id.* at 428. These practices were understood by the Forest Service to be consistent with the Organic Administration Act. *Id.* at 427. However, the District Court disagreed. The court held that the language of Section 476 meant

> that trees can be sold and cut only if they are "dead, matured or large growth" and then may be sold only when the sale serves the purpose of preserving and promoting the younger growth of timber on the national forests.

Id. at 429. In essence, the *Monongahela* decision, later affirmed by the Fourth Circuit (which invited Congress to revise the Organic Administration Act, *Monongahela*, 522 F.2d at 955), and followed by other courts (*see for example*, *Zieske v. Butz*, 406 F. Supp. 258 (D. Alaska 1975) (invalidating a 50-year old timber sale which had been consummated 24 years previously)), managed to severely curtail the authority of the Forest Service to conduct timber sales.

The response from Congress was swift. Several bills were introduced to counteract the effect of *Monongahela* and its progeny. Hall and Wasserstrom, 8 Env. L. at 524 (citation omitted). Representative Tom Foley, then-chairman of the House Agriculture Committee, bemoaned the situation created by these court decisions, claiming "if Congress does not act very soon, there will shortly be a nationwide sawtimber shortage of crisis proportions." *Id.* (citation omitted). While it is true that preservationist interests were discussed and debated within the Congress, including severe curtailment of clearcutting, the resulting bill, authored by Senator Hubert H. Humphrey, clearly favored a continued policy of promoting timber production, with provisions for employing clearcutting and other even-aged management techniques. Stephanie M. Parent, *The National Forest Management Act: Out of the*

Forest Management Act: Out of the Woods and Back to the Courts? 22 Env. L. 699, 709 (1992) (citation omitted).

The National Forest Management Act repealed that section of the Organic Administration Act which was the basis for the *Monongahela* decision. Pub. L. No. 94-588, § 13, and grandfathered in all previous timber sale contracts entered into by the Forest Service in which the Forest Service had utilized its existing "silvicultural practices and sales procedures." Pub. L. No. 94-588, § 15. Senator Humphrey, in introducing the bill which eventually became the National Forest Management Act, pronounced: "In short, this bill is designed to get the practice of forestry out of the courts and back to the forests." Hall and Wasserstrom, 8 Env. L. at 523 (citation omitted). While it is true that the National Forest Management Act imposed procedural requirements upon the Forest Service, contrary to the implication of the Sixth Circuit's opinion, the National Forest Management Act restored the authority of the Forest Service to manage national forests for the purpose of timber production and to utilize even-aged management techniques in promoting their health and productivity.

B. The Sixth Circuit's Creation of the "Exceptional Circumstances" Test Is Unjustified, Since the National Forest Management Act Clearly Contemplates the Use of Even-Aged Management

Senator Humphrey's remark that the National Forest Management Act was intended to remove the judiciary from engaging in forest management has taken on a certain irony in this case. The Sixth Circuit's interpretation of the National Forest Management Act is an echo of the situation which prompted adoption of the Act in the first place: judicial interference in forestry practices. While the National Forest Management Act did not resolve all potential conflicts between preservationists and foresters, it answered precisely one of the questions addressed in this case: the propriety of using even-aged management techniques such as clearcutting.

Section 1604 delineates the criteria under which even-aged management may be used as a cutting system on National Forest System lands. In addition to meeting procedural requirements for how even-aged management practices should be implemented, the National Forest Management Act provides that clearcutting should be allowed where it is the "optimum" method of harvesting, and where use of even-aged management is consistent with protecting environmental resources and generating timber. 16 U.S.C. § 1604(g)(3)(F).

In this case, the District Court analyzed each of the factors outlined in Section 1604, as well as the Forest Service regulations implementing that statute, and reviewed the administrative record to insure that the Forest Service met its statutory obligations in developing the Wayne Plan. Part of the administrative record revealed why the Forest Service concluded that clearcutting would be suitable in the Wayne National Forest:

> In summary, where oak-hickory reproduction is not a problem, clearcutting is optimum. It offers more flexibility of location to manage timber for other purposes, higher revenues, lower costs, and less risk. In nearly all cases, clearcutting will regenerate as much, or more, oak than uneven-aged management by the group-selection method and more than would be regenerated using [a] single-tree selection method of management.

Robertson, 845 F. Supp. at 493. In sum, the record revealed that the Forest Service based its decision in accordance with the standards delineated in the National Forest Management Act. Nonetheless, the Sixth Circuit concluded that the Forest Service had exercised flawed judgment.

Rather than follow the statutory requirements for when clearcutting is allowed, the Sixth Circuit substituted its own test, stating that clearcutting was only permissible under

"exceptional circumstances." Though harvesting by clearcutting can leave plots of forest land in a temporarily unattractive state, this has no bearing upon the question of whether clearcutting is the "optimum" method of forest management, or is consistent with the preservation of forest resources. By viewing clearcutting as inherently "bad," despite the fact that nature itself "clearcuts" by fire, disease, or windstorms, the Sixth Circuit simply substituted its own uninformed judgment upon the utility of clearcutting in the practice of forestry for the experience and expertise of the Forest Service.

This second-guessing by the Sixth Circuit was precisely the type of judicial interference Congress sought to curtail in enacting the National Forest Management Act. Though attempts were made in the legislature to limit the Forest Service's ability to employ even-aged management techniques, such efforts were soundly rejected. Hall and Wasserstrom, 8 Env. L. 531 n.41 (citation omitted). In stark contrast, Congress adopted virtually wholesale the "Church Guidelines"--guidelines that dictated when even-aged management was appropriate--in Section 1604(g)(3)(E) and (F) of the National Forest Management Act. *Id.* at 532; Parent, 22 Env. L. at 712-15. Given that the Church Guidelines had been adopted by the Forest Service in 1972, it is difficult to imagine a more explicit statement from Congress that it endorsed the existing even-aged management practices already employed by the Forest Service at that time. Hall and Wasserstrom, 8 Env. L. at 531.

Because the *Monongahela* decision banning clearcutting was the impetus behind the National Forest Management Act, the issue of clearcutting and other even-aged management techniques was exhaustively discussed by Congress--and rigorously defended by the forestry professionals who testified before Congress that it was a necessary and useful management tool if exercised in an environmentally responsible way. *See generally*, Hall and Wasserstrom, 8 Env. L. at 527-33. With

minor qualifications designed to account for environmental concerns, Congress opted in favor of letting the Forest Service determine when even-aged management was appropriate. Senator Humphrey's bill, which gave considerable deference to Forest Service's expertise, passed by a vote of 90 to 0. *Id.* at 528 (citation omitted). The House bill passed by a vote of 305 to 24. *Id.* (citation omitted). President Ford signed the National Forest Management Act into law in October of 1976. *Id.* In all, it took only 14 months for Congress to respond to the Fourth Circuit's affirmance of the decision in *Monongahela* banning clearcutting. *Id.* (citation omitted).

In imposing its own standards of what constitutes sound forestry, the Sixth Circuit displayed utter disregard for the intent of Congress in passing the National Forest Management Act and for the expertise and integrity of the Forest Service in carrying out its statutory duties. This Court should reverse the decision of the court below for overstepping its proper role in applying the law, rather than creating it.

CONCLUSION

One hundred years ago, Congress created the National Forest System to assure that United States citizens would have a continuous supply of timber. The value of this resource is underscored by the fact that wood and wood products continue to be of tremendous utility and necessity. While forests provide other resources for recreation and a healthy environment, Congress has steadfastly adhered to the principle that, for lands specifically set aside as national forests, the balance of needs favor the practical and tangible commodities that timber can provide. In finding that the Forest Service's emphasis on timber production constituted "bias," the Sixth Circuit ignored both statutory language and legislative history surrounding the congressional enactments governing national forest lands and the Forest Service's obligations in managing them. This Court

should reject the Sixth Circuit's ruling, and hold that the production of timber for harvesting is not merely a legitimate goal of the Forest Service in managing national forests, but a statutory obligation.

Congress also understood that forest management is best practiced by forestry professionals, rather than legislators or judges. Congress thus delegated a great deal of discretion to the Forest Service to make basic decisions about the management of National Forest System lands, including determining when responsible management practices dictate the use of clear-cutting. The Sixth Circuit's creation of the "exceptional circumstances" standard for determining when clearcutting may be used is thus unsupportable. This Court should reject this judicially imposed standard and restore the proper standard: whether facts in the record support Forest Service decisions to clearcut based upon the applicable statutory guidelines.

For the reasons stated above, this Court should reverse the decision of the Sixth Circuit holding that the Forest Service acted arbitrarily and capriciously in developing the Land and Resource Management Plan for the Wayne National Forest.

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Respectfully submitted,

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